



Date: June 12, 1998

**Case No: 97 INA 292**

In the Matter of:

**JULIETTA C. MANUEL,**  
Employer

on behalf of

**BENITA C. CASTRO,**  
Alien

Before: Huddleston, Lawson, and Neusner  
Administrative Law Judges

FREDERICK D. NEUSNER  
Administrative Law Judge

Appearance: T. A. Behlendorf, Esq., of Los Angeles, California

## **DECISION AND ORDER**

This case arose from an application for labor certification on behalf of BENITA C. CASTRO (Alien) filed by JULIETTA C. MANUEL (Employer), pursuant to § 212(a)(14)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(14) (A) (the Act), and regulations promulgated thereunder, 20 CAR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at San Francisco, California, denied this application, the Employer requested review pursuant to 20 CAR § 656.26.<sup>1</sup>

**Statutory authority.** An alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient U. S. workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed. See 8

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<sup>1</sup>The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appellate File (AF), and written arguments of the parties. 20 CAR § 656.27(c).

U.S.C. § 1182(a)(14)(A). An employer desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CAR, Part 656 have been met. Such requirements include the responsibility of the employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability at that time and place.<sup>2</sup>

## STATEMENT OF THE CASE

**Application.** On September 12, 1994, the Employer applied for labor certification to enable the Alien, a national of the Philippines to be hired for the job of "Private Tutor/ Nanny" in her household. AF 45. The position was classified by the DOT as "Children's Tutor," No. 099.227-010.<sup>3</sup> Employer described the job as follows:

Will assist three (3) children with their school work, assisting them individually with their lesson assignments. Will give private instructions specifically in English and Mathematics. Will teach them Filipino (Tagalog) language. Will give guidance in their general upbringing, overseeing recreation, diet, good health and personal habits. Will discuss with parents any problems or progress of the children.

AF 45. Employer offered wages at the rate of \$1,837 per month, based on a forty hour week, from 11:00 AM to 8:00 PM. The educational requirement was a baccalaureate degree in Elementary Education plus two years of experience in the Job Offered. The Other Special Requirements were, "Must have work experience in children's education." *Id.* The Employer's recruitment effort resulted in the referral of one qualified U. S. worker, who was not hired. AF 52.

**Notice of Findings.** On June 28, 1996, a Notice of Findings (NOF) by the Certifying Officer (CO) concluded that the Employer failed to prove entitlement to certification based on restrictive hiring criteria under 20 CAR §§ 656.21(b)(2)(i)(A) that required job candidates to have a baccalaureate degree plus two years of experience in the Job Offered or in a Related Job as a "private tutor/nanny." AF 35. After reviewing the job duties described by Employer in Item 13 of the ETA Form 750A, the CO said that the work specified for the position she offered more closely resembled the functions of a Children's Tutor under DOT No. 099.227-010 than the job

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<sup>2</sup>Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

<sup>3</sup>**099.227-010 CHILDREN'S TUTOR** (domestic ser.) Cares for children in private home, overseeing their recreation, diet, health, and deportment: Teaches children foreign languages, and good health and personal habits. Arranges parties, outings, and picnics for children. Takes disciplinary measures to control children's behavior. Ascertains cause of behavior problems of children and devises means for solving them. When duties are confined to care of young children may be designated Children's Tutor, Nursery (domestic ser.). GOE: 10.03.03 STRENGTH: L GED: R4 M2 L4 SVP: 5 DLU: 77

duties of a Tutor under DOT Occupational Code No. 099.227-034.<sup>4</sup> See **Julie C. L. Yuen Chin**, 91 INA 321 (Feb. 19, 1993). In comparing DOT occupational descriptions of the work of a Tutor and of a Children's tutor, the CO said the Employer's requirement of two years' experience in the job offered and a baccalaureate degree in Child Education or any specialty in Education was restrictive within the meaning of 20 CFR § 656.21(b)(2)(i)(A). As such qualifications are not normally required for the successful performance of the job in the United States, CO observed that the position offered by the Employer involves daily child care in the Employer's home, including guidance in their general upbringing, and overseeing recreation, diet, good health, and personal habits. "From the description of the job duties," said the CO, "it appears that the employee's principal activity is supervising the children, not teaching academic subjects. This also indicates that the position offered is a Children's Tutor, not a Tutor." AF 35-36. The CO explained that the Standard Vocational Preparation (SVP) for the occupation of Children's Tutor extends from six months up to and including one year of experience in the Job Offered. The Employer's requirement of a baccalaureate degree in Education plus more than one year of experience in the Job Offered materially exceeds the SVP, said the CO in finding this to be a restrictive requirement. The CO then discussed the Employer's options in rebuttal, and said the Employer could either delete the restrictive requirements and retest the labor market, prove that the requirements are common for the occupation in the United States, or justify the restrictive requirement on the basis of its "business necessity."

**Rebuttal.** The Employer's March 11, 1996, rebuttal included exhibits and a brief addressing issues raised in the NOF. The Employer did not regard her hiring criteria of education and experience as unduly restrictive. Contending that a Tutor and not a Children's Tutor was in fact required, the Employer compared the duties of a Tutor under DOT Occupational Code No. 099.277-034 with the description of a Children's Tutor under DOT Occupational Code 099.227-010 and said the work under No. 099.277-034 more closely resembles the work described at Part 13 of her application in Form ETA 750A. Employer contended that the CO improperly classified the position of a tutor, and she said the duties listed were those of a Tutor because they included the teaching of academic subjects to children. By contrast, she argued, a Children's Tutor will "just take care of the children" but will not tutor them in their academic subjects which, she said, is the main job responsibility of the tutor. AF 20. (Emphasis as in the original.) The Employer argued that the principal activity of the worker would be to assist the children in their lesson assignments in English, mathematics, science and social studies.<sup>5</sup>

**Final Determination.** In denying certification on June 6, 1996, the CO's Final Determination found that Employer's Rebuttal was not persuasive. AF 15-18. Rejecting the Employer's rebuttal argument, the CO concluded that, because the Employer failed to prove her

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<sup>4</sup>**099.227-034 TUTOR** (education) Teaches academic subjects, such as English, mathematics, and foreign languages to pupils requiring private instruction, adapting curriculum to meet individual's needs. May teach in pupil's home. GOE: 11.02.01 STRENGTH: L GED: R5 M3 L5 SVP: 7 DLU: 77

<sup>5</sup>At that time in 1996, the children were in grades four, three, and one, respectively. As the application was filed two years earlier in 1994, and the position was advertised in 1995, this statement in the Rebuttal was based on circumstances facts that were different from the facts that existed at the time of application.

contention that this position requires a Tutor and not a Children's Tutor, the minimum requirements of a baccalaureate degree and two years of experience in the Position Offered were unduly restrictive and would preclude the referral of otherwise qualified U. S. workers. The CO then reviewed the Job Duties described in the Employer's application together with the DOT descriptions of the work of a Children's Tutor and of a Tutor in the DOT, and the Employer's argument in the Rebuttal that the position was improperly classified as a Children's Tutor. The CO again concluded that the duties described by the Employer in the Form ETA 750A support the inference that duties Employer's application required of the worker in this position more closely resemble those of a Children's Tutor than those of a Tutor, as delineated in the DOT. The CO said of Employer's argument,

The children attend school full time, so it is assumed that most of their education will be received there. Most of the duties are those of a 'children's tutor.' Therefore, the information submitted by the employer is not sufficient to show the position is other than a position for a children's tutor.

AF 17-18. The CO denied certification, concluding that the Employer failed to sustain her burden of proof in justifying the restrictive requirements of two years of experience and a Bachelor's Degree in Elementary Education. The CO said that Employer failed to prove that the Job Offered is a position for a Tutor under DOT 099.227-034, as distinct from a position for a Children's Tutor under DOT No. 099.227-010. At the same time, the CO continued, the Employer failed to delete her requirements for experience and education in excess of the SVP and retest the labor market at the corrected level. In addition, said the CO the Employer failed to show either that her educational requirements were common for the occupation in the United States or that they were justified by business necessity. Concluding that the application was in violation of 20 CFR § 656.21(b)(2)(i)(A), the CO denied alien labor certification.

**Appeal.** On July 2, 1996, the Employer filed a motion for reconsideration, which the CO denied on July 17, 1996, citing **Harry Tancredi**, 88 INA 441(Dec. 1, 1988)(*en banc*). The CO then referred this matter to BALCA.

## Discussion

In denying reconsideration, the CO correctly cited **Harry Tancredi**, as the Employer's argument did not contain any new reasons or citations of evidence that she could not have presented in the rebuttal. At no point in the Employer's rebuttal or in her correspondence with the Department of Labor and the Certifying Officer did Employer amend or withdraw the explicit child care and other non-academic job duties stated in Form 750A, part 13, of this application. Because this job involved more than the DOT's description of the duties of a Tutor, as quoted in its entirety in footnote No. 4, *supra*, the Employer failed to prove its contention that this job description must be filled by a Tutor and not a Children's Tutor. Based on these reasons the panel agrees with the conclusion of the CO that the Employer's Job Duties and Special Requirements were unduly restrictive within the meaning of 20 CFR

656.21(b)(2), after considering the Rebuttal and Employer's brief with the entire record.<sup>6</sup>

Accordingly, we conclude that the evidence of record supported the denial of alien labor certification and enter the following order.

## **ORDER**

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel.

FREDERICK D. NEUSNER  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W.  
Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

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<sup>6</sup>In examining the evidence of record we observed (1) the report cards for the two older children did not confirm academic deficiencies that required a Tutor. Rather, they pointed to developmental behavior problems associated with the immaturity of the children that appeared to work themselves out as the year wore on. (2) The "recommendations" for the hiring of a tutor were transparently suspect because (a) they were identical forms using the same words and type faces and (b) they did not give any reasons but merely agreed that a *bona fide* tutor would be helpful. We agree with the CO's apparent rejection of these forms as persuasive evidence in this matter.